Supreme Court U.S.
FILED
JUL 3 2002
OFFICE OF THE CLERK

No. 01-1790

In The

Supreme Court of the United States

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, LOCAL 38,

Petitioner,

v.

HUBER, HUNT & NICHOLS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES P. WATSON
Counsel of Record
STANTON, KAY & WATSON, LLP
101 New Montgomery Street, Fifth Floor
San Francisco, California 94105
(415) 512-3501

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

2829

QUESTION PRESENTED FOR REVIEW

Respondent does not agree with the characterization of the question presented for review offered by the Petitioner. In Respondent's view, the question presented is whether the Court of Appeals correctly determined that provisions of a project labor agreement, which supervened provisions of subordinate collective bargaining agreements, allocated to the project labor agreement arbitrator the authority to determine whether a claim made by one signatory union was a jurisdictional claim to be referred for resolution in accordance with the jurisdictional dispute resolution provisions of the project labor agreement.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
I. OPINIONS BELOW	1
II. JURISDICTIONAL STATEMENT	1
III. STATUTORY PROVISIONS	2
IV. STATEMENT OF FACTS	2
V. ARGUMENT	7
A. THE NINTH CIRCUIT CORRECTLY DECIDED THAT THE PROJECT LABOR AGREEMENT OVERRODE ANY CONFLICTING PROVISIONS IN THE UNDERLYING COLLECTIVE BARGAINING AGREEMENTS OF THE TRADE UNIONS	7
B. THIS CASE DOES NOT PRESENT A MAJOR INTER-CIRCUIT CONFLICT	8
C. ARBITRATOR McKAY'S RULING TRUMPS THE CONTRARY FINDINGS OF THE LOCAL 38 GRIEVANCE COMMITTEE	9
D. THE PSA ARBITRATOR'S RULING ACCORDS WITH CASE LAW ON THE DEFINITION OF A JURISDICTIONAL DISPUTE	11
E. THE JURISDICTIONAL DISPUTE BETWEEN LOCAL 38 AND HUBER MUST BE RESOLVED PURSUANT TO THE PROJECT STABILIZATION AGREEMENT	14

TABLE OF CONTENTS – Continued

Page

F. THE GRIEVANCE FILED BY LOCAL 38 DOES NOT CONSTITUTE A PURELY CONTRACTUAL DISPUTE BECAUSE THERE EXISTED COMPETING CLAIMS FOR THE DISPUTED WORK 19

VI. CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).....14

Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts, 113 S.Ct. 1190 (1993).....7, 10

Carpenters Los Angeles County Council (Swinerton & Walberg), 298 N.L.R.B. 412 (1990).....6

Hunter Construction Co. v. International Union of Operating Engineers Local 139, 862 F.2d 641 (1998).....8

IUOE Local 103 v. Indiana Construction Corporation, 13 F.3d 253 (7th Cir. 1994).....9

International Longshoremen's and Warehousemen's Union, Local 14 v. National Labor Relations Board, 85 F.3d 646 (D.C. Cir. 1996).....12

International Longshoremen's & Warehousemen's Union, Local 62-B v. National Labor Relations Board, 781 F.2d 919 (D.C. Cir. 1986).....11, 12, 14

International Union of Operating Engineers, Local 926, 254 N.L.R.B. 994 (1981).....11

Laborers International Union (Capitol Drilling Supplies), 318 N.L.R.B. No. 100 (1995).....6, 10, 19

Laborers Local 113 (Super Excavators), 327 N.L.R.B. No. 31, 159 L.R.R.M. 1281 (1998).....6, 20, 21

Local 30, United Slate, Tile & Composition Roofers v. NLRB, 1 F.3d 1419 (3rd Cir. 1993).....6

TABLE OF AUTHORITIES – Continued

Page

Meiswinkel v. Laborer's Union Local 261, 744 F.2d 1374 (9th Cir. 1984) 14, 15, 16

Miron Construction Co. v. International Union of Operating Engineers, 44 F.3d 558 (1995) 8

New England Mechanical, Inc. v. Laborers Local Union 294, 909 F.2d 1339 (9th Cir. 1990) 16

Plasterers and Cement Masons, Local 502 (PMB Concrete, Inc.), 328 N.L.R.B. 84, 161 L.R.R.M. 1211 (1999) 20

Southern California District Council of Laborers v. Berry Construction, 984 F.2d 340 (9th Cir. 1993) 14

Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc., 925 F.2d 1136 (9th Cir. 1990) 14

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local No. 342 v. Bechtel Construction, 128 F.3d 1318 (9th Cir. 1997) 12

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) 15

STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. §§ 158(e), (f) 2

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Huber, Hunt & Nichols, Inc. (now The Hunt Corporation) opposes the issuance of a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Ninth Circuit in this proceeding.

I.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 282 F.3d 746 (9th Cir. 2002) and is reproduced in the Appendix to the Petition for Writ of Certiorari. The District Court's unpublished Judgment and Order Regarding Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment are available at 2000 U.S. Dist. LEXIS 15238 and 142 Lab. Cas. (CCH) ¶10,835 and are reproduced in Appendix B to the Petition for Writ of Certiorari.

II.

JURISDICTIONAL STATEMENT

On March 6, 2002, the United States Court of Appeals for the Ninth Circuit filed its opinion in this case on appeal from the Judgment and Order regarding Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment, both entered in the civil docket by the United States District Court for the Northern District of California on October 12, 2000. The parties agree that the Supreme Court of the United States has jurisdiction to review the opinion of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

III

STATUTORY PROVISIONS

The relevant statutory provisions are Sections 8(e) and (f) of the National Labor Relations Act ("NLRA") (29 U.S.C. §§ 158(e), (f)). These provisions are set forth in the body of the Petition for Writ of Certiorari.

IV.

STATEMENT OF FACTS

The within action was brought by Huber, Hunt & Nichols, Inc. ("Huber") to confirm an arbitration award issued in its favor by Permanent Arbitrator Gerald McKay under the Project Stabilization Agreement ("PSA") for the Pacific Bell Ballpark Project in San Francisco and to vacate a conflicting arbitration award issued in favor of Defendant/Appellee United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry Local 38 ("Local 38") by the Arbitration Committee under Local 38's collective bargaining agreement.

Permanent Arbitrator McKay's arbitration award concluded that the underlying grievance filed by Local 38 constituted a jurisdictional dispute pursuant to Articles 5.2 and 6.4 of the PSA, which mandated the exclusive remedies for resolution of jurisdictional disputes. Arbitrator McKay did not address the merits of Local 38's jurisdictional claim.

The Local 38 Arbitration Committee, concluding that the underlying grievance constituted a breach of contract claim rather than a jurisdictional claim, issued a conflicting arbitration award under Local 38's collective bargaining agreement.

Huber is a general contractor which performed construction work on the Pacific Bell Ballpark Project. On or about January 18, 2000, Local 38 filed a grievance against Huber protesting the assignment of certain work by Huber's subcontractors to unions other than Local 38.

Huber, contending that the grievance constituted a jurisdictional dispute which must be resolved pursuant to the PSA, submitted the grievance to Arbitrator McKay, as designated under the PSA. Local 38, contending that the grievance constituted a breach of the exclusive hiring and subcontracting provisions in its collective bargaining agreement, submitted the grievance to the Arbitration Committee under Local 38's own collective bargaining agreement.

On February 16, 2000, Arbitrator McKay convened a hearing under the PSA and concluded that the grievance filed by Local 38 constituted a jurisdictional dispute. Local 38 refused to participate in the hearing. Arbitrator McKay issued his arbitration award, which directed the parties to resolve the jurisdictional dispute in accordance with the mandatory guidelines set forth in Article 5.2 of the PSA. (*See* Petitioner's Lodging, p. 6)

Following Arbitrator McKay's award, on February 23, 2000 the Arbitration Committee, convened under Local 38's collective bargaining agreement, contrarily concluded that the grievance did not constitute a jurisdictional dispute but a breach of Local 38's exclusive hiring and subcontracting provisions. The Arbitration Committee issued its conflicting arbitration award, granting Local 38 damages against Huber in the amount of $110,547.80.

On February 18, 2000, Huber filed its petition in the United States District Court, Northern District of California,

Case No. 00-0578, seeking to confirm the February 16, 2000 arbitration award issued in its favor by Arbitrator McKay under the Project Stabilization Agreement.

On or about March 6, 2000, Local 38 filed its Response to Huber's petition and a counterclaim for confirmation of the Local 38 arbitration decision.

On March 29, 2000, Huber filed an amended Application for confirmation of Petitioner's arbitration award and an application to vacate Respondent's arbitration award.

On April 21, 2000, Huber filed its answer to the counterclaim of Local 38 for confirmation of its arbitration award and request to vacate the arbitration award of Arbitrator McKay.

On April 21, 2000, Huber filed a motion for summary judgment contending, as a matter of law, that the District Court must not only confirm the arbitration award issued by Arbitrator McKay under the PSA, but vacate the arbitration award issued by the Arbitration Committee under Local 38's collective bargaining agreement, because the grievance filed by Local 38 constituted a jurisdictional dispute which required resolution under the procedures mandated by the PSA. Huber argued that Arbitrator McKay's determination that Local 38's claim was a jurisdictional dispute was a factual and legal finding which the trial court had no jurisdiction to disturb. Individual collective bargaining agreements of craft unions are subordinate to and subject to the supervening provisions of the PSA. (*See* discussion *infra*). Any conflict between Arbitrator McKay's findings under the PSA and a determination of the grievance panel of a single craft union must be resolved in favor of the PSA arbitrator's decision.

On or about April 20, 2000, Local 38 filed its countermotion for summary judgment seeking to vacate the arbitration award issued by Arbitrator McKay and to confirm the arbitration award issued by the Local 38 Arbitration Committee on the grounds that the underlying grievance constituted a breach of Local 38's exclusive hiring and subcontracting provisions rather than a jurisdictional dispute.

On October 5, 2000, the District Court issued its Order Regarding Plaintiff's Motion and Defendant's Cross-Motion For Summary Judgment ("Order").[1] In the Order, the District Court identified the issue before the Court in the cross-motions for summary judgment:

> The parties dispute whether the January 18 grievance was jurisdictional in nature. If the grievance was a jurisdictional dispute, then under section 6.4 of the PSA, the parties should have employed the PSA dispute resolution process. The PSA awards should therefore be confirmed and the committee award[2] should be vacated. On the other hand, if the grievance did not provoke a jurisdictional dispute, the parties were bound to use the CBA[3] arbitration procedures.

As the Ninth Circuit panel unanimously found, the District Court erroneously concluded that the grievance

---

[1] The "Order" addressed a second award pertaining to "off-site" work which is not the subject of this proceeding.

[2] The "committee award" refers to the arbitration award issued by the Arbitration Committee under Local 38's collective bargaining agreement.

[3] The "CBA" refers to Local 38's collective bargaining agreement.

filed by Local 38 constituted a contractual claim rather than a jurisdictional claim. The District Court incorrectly vacated the arbitration award issued in favor of Huber under the PSA and confirmed the arbitration award issued in favor of Local 38 by the Arbitration Committee under Local 38's collective bargaining agreement. The trial court's decision was based primarily upon the NLRB's controversial 3-2 opinion in *Laborers International Union (Capitol Drilling Supplies)*, 318 NLRB No. 100 (1995) which overruled twenty years of Board law and held that the Board could not conduct a jurisdictional review under Section 10(k) of the National Labor Relations Act ("NLRA") where the union claiming work its members were not assigned merely grieves the alleged misassignment and seeks *only* monetary relief unaccompanied by any coercive conduct violative of Section 8(b)(4)(D) of the NLRA. (That issue, which is one of fact, is disputed in this case.)

But as noted by the Board in *Laborers Local 113 (Super Excavators)*, 327 NLRB No. 31, 159 LRRM 1281 (1998), "The Board (in *Capitol Drilling*) did not overrule prior cases insofar as they held that a 'pay-in-lieu' grievance may constitute a competing claim for work. *See Carpenters Los Angeles County Council (Swinerton & Walberg)* 298 NLRB 412, 414 (1990). *See also Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419, 1427 (3rd Cir. 1993) (attempted distinction 'between seeking the work and seeking pay for the work is ephemeral.') *Super Excavators*, n. 5." On appeal, the Ninth Circuit panel unanimously reversed, finding on its *de novo* review of the record that the PSA arbitrator's decision was entitled to deference and trumped any contrary findings

by self-interested panels of union and employer representatives of individual construction crafts.

V.

ARGUMENT

A. THE NINTH CIRCUIT CORRECTLY DECIDED THAT THE PROJECT LABOR AGREEMENT OVERRODE ANY CONFLICTING PROVISIONS IN THE UNDERLYING COLLECTIVE BARGAINING AGREEMENTS OF THE TRADE UNIONS

Petitioner's brief completely ignores the fact that this case does not involve a single collective bargaining agreement between a union and an employer; rather it involves a project labor agreement to which many labor unions and contractors and subcontractors are signatory. Such agreements are common in the construction industry; *see, e.g., Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts*, 113 S.Ct. 1190 (1993). Unfortunately, the shrinking union workforce in this country and the corresponding shrinking union membership often motivates unions to "cannibalize" the work of other trade craft unions. This case is an example of such activity. It must be noted that the arbitrator did not *rule against* the petitioner, but merely referred the claim to the jurisdictional resolution procedures which are available to the basic craft unions to resolve issues regarding entitlement to particular work assignments. By contrast, the Local 38 collective bargaining agreement grievance procedure, which is not concerned with the interests of any other trade craft unions, was a virtual "kangaroo court" which inevitably resulted in an award to Local 38, the only union in attendance at the hearing. The

only realistic choice the arbitrator had was to respect the all-craft project labor agreement and refer the jurisdictional claim to resolution pursuant to its provisions.

B. THIS CASE DOES NOT PRESENT A MAJOR INTER-CIRCUIT CONFLICT

In Part III of its petition, petitioner asserts that the decision in the referenced action creates a major inter-circuit conflict because it is contrary to decisions issued by the Seventh Circuit; *see Hunter Construction Co. v. International Union of Operating Engineers Local 139*, 862 F.2d 641 (1998), and *Miron Construction Co. v. International Union of Operating Engineers*, 44 F.3d 558 (1995).

In fact, these cases have nothing whatsoever to do with the issue involved in this case.

In *Hunter*, the employer was signatory to a *single collective bargaining agreement* (not a multi-craft project labor agreement) and the *only* issue was whether the subcontracting of work to a non-signatory was subject to bipartite arbitration under the contract or subject to tripartite arbitration as a "jurisdictional dispute." The court had little difficulty in determining that the grievance was properly submitted to bipartite arbitration as a violation of the collective bargaining agreement. There was no multi-craft project labor agreement and no conflict between the provisions of different agreements for the court to resolve.

In *Miron*, *supra*, the court was confronted with a claim for breach of the *same* area-wide contract, and, following *Hunter*, concluded that the matter was subject to bipartite arbitration. Again, there was no project labor agreement, no multiplicity of crafts claiming the work, and

no issue about whether a project labor agreement would preempt or trump countervailing provisions of the bargaining agreement being considered. The Seventh Circuit cases thus are factually inapposite from the present case and there is no issue conflict for this Court to resolve. *See also IUOE Local 103 v. Indiana Construction Corporation*, 13 F.3d 253 (7th Cir. 1994).

C. ARBITRATOR McKAY'S RULING TRUMPS THE CONTRARY FINDINGS OF THE LOCAL 38 GRIEVANCE COMMITTEE

Arbitrator McKay ruled: "Local 38's claim that the employer should force its subcontractors to reassign work to members of Local 38 is a jurisdictional claim arising under the provisions of the Project Stabilization Agreement.... It is not an individual claim under a Local Collective Bargaining Agreement.... UA Local 38 is not entitled under Article 6.4 (of the PSA) to have this jurisdictional claim heard as part of a grievance under its Local Collective Bargaining Agreement or to discuss the claim as a wage claim for the difference between what the workers who did the work were paid and what UA members are paid. *A jurisdictional claim is a jurisdictional claim no matter how it is dressed up.*" [Emphasis supplied] The trial court, contrary to the ultimate decision of the Ninth Circuit, elected to treat PSA Arbitrator McKay's ruling as if it were on an equal footing with the decision of the Local 38 grievance panel. But it was not; the PSA overrides conflicting provisions of individual craft bargaining agreements. (*See* PSA Sec. 2.2, Petitioner's Lodging, p. 2) It then treated Local 38's claim as if Huber Hunt & Nichols had filed an 8(b)(4)(D) charge with the NLRB seeking a 10(k) jurisdictional determination. But Huber did not and

could not. 10(k) relief before the NLRB under *Capitol Drilling* is only available when the union has engaged in coercive conduct to enforce its claim.

Local 38 was also party to the project-wide PSA, which contains its *own internal* mandates for resolving disputes. The NLRB's procedures were never involved. The *whole purpose* of a project-wide labor agreement is to assure speedy and final resolution of disputes, and avoid the expensive and time-consuming procedures of the NLRB and the courts. *See, generally, Building and Construction Trades Council, supra*, 113 S.Ct. 1190 (1993). The vice of the trial court's decision (and the vindication of the Ninth Circuit's decision) is the trial court's failure to take cognizance of Section 2.2 of the PSA, which provides that "Any provision of a Local Collective Bargaining Agreement contrary to the intent and meaning of this Agreement *shall not be enforced* as to the Contractor or Subcontractor working under the terms of this Agreement."

The January 18, 2000 grievance filed by Local 38 arose out of a jurisdictional dispute regarding the assignment of work by Huber's subcontractors to competing unions, namely, the Laborers, the Carpenters and the Sheet Metal Workers, which work Local 38 claimed fell within the recognized scope of work of Local 38's collective bargaining agreement. Subjecting such a claim to a "kangaroo court" hearing before the self-interested Local 38's own grievance committee "freezes out" the interests of the other crafts claiming the work. (It is undisputed that no other craft attended the Local 38 hearing.) This scarcely contributes to the overall project stability which the PSA was designed to protect.

D. THE PSA ARBITRATOR'S RULING ACCORDS WITH CASE LAW ON THE DEFINITION OF A JURISDICTIONAL DISPUTE

In *International Longshoremen's & Warehousemen's Union, Local 62-B v. National Labor Relations Board*, 781 F.2d 919, 923 (D.C. Cir. 1986), the Court held that the "essence of a jurisdictional dispute" is "the existence of a 'dispute between two or more groups of employees over which is entitled to do certain work for an employer.'" *Id.* at 924, citing *NLRB v. Radio Television Broadcasting Engineers Union, Local 1212*, 364 U.S. 573, 579, 81 S.Ct. 330, 5 L.Ed.2d 302 (1961).

In addition, the D.C. Circuit identified two defining characteristics of a jurisdictional dispute:

> First, the employer faces a jurisdictional dispute that is not of his own making and in which he has no interest; second, the dispute is between two employee groups. *International Longshoremen's & Warehousemen's Union, Local 62-B* at 781 F.2d at 924.

The D.C. Circuit stated that the NLRB will recognize a jurisdictional dispute even in cases where no dispute appears at first glance:

> . . . the [NLRB] has held that, where certain employees were doing work and another group of employees demanded that work, these [jurisdictional] provisions applied. Even though the first group of employees may not have explicitly claimed the work, the fact that they were *doing* the work was evidence of their claim. *Id.*, citing *International Union of Operating Engineers,*

> *Local 926*, 254 NLRB 994, 996 (1981).[4] [Emphasis supplied.]

See also International Longshoremen's and Warehousemen's Union, Local 14 v. National Labor Relations Board, 85 F.3d 646, 652 (D.C. Cir. 1996) (craft employees' performance of disputed work is evidence of their claim to the disputed work, even absent an explicit claim for that work.) The Court in *Local 14* further noted that just because the group of employees actually performing the disputed work did not voice a concern about keeping the disputed work, does not indicate that the employees would not protest if that work were actually taken away from them. *Id.* This is just common sense.

The Ninth Circuit recognizes a jurisdictional dispute as nothing more than a dispute between two or more unions, each of whom is claiming a right to perform the disputed work. *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local No. 342 v. Bechtel Construction*, 128 F.3d 1318, 1320 (9th Cir. 1997).

In the case at hand, on January 18, 2000, Local 38 filed a grievance against Huber alleging that certain of Huber's subcontractors assigned work to other unions which scope of work fell within the jurisdiction of Local 38.

---

[4] In *International Longshoremen's & Warehousemen's Union, Local 62-B, supra*, the Court held that no jurisdictional dispute existed because the employer directly assigned the disputed work and further, the employer clearly had an interest in assigning the work to its own employees as opposed to a competing group. *Id.* at 925. In the case at hand, the jurisdictional dispute was not of Huber's making, as Huber did not assign the disputed work to its own employees and had no interest in which of the competing unions performed the work.

Citing to Article X, section 66, of its own collective bargaining agreement, Local 38 alleged that:

> The recognized **scope of work** of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada . . . is as follows (Emphasis added):
>
> (3) All cold, hot and circulating water lines, piping for house pumps, cellar drainers, ejectors, house tanks, pressure tanks, swimming pools, ornamental pools, display fountains, drinking fountains, aquariums, plumbing fixtures and appliances, and the handling and setting of the above-mentioned equipment;
>
> (8) All bathroom, toilet room and shower room accessories, i.e., as towel racks, paper holders, glass shelves, hooks, mirrors, cabinets, etc.; and
>
> (9) All lawn sprinkler work, including piping, fittings and lawn sprinkler heads.

The January 18, 2000 grievance demonstrates that a dispute existed between competing unions (in this case, Local 38, the Laborers, the Carpenters and the Sheet Metal Workers) as to which union was entitled to perform certain work. The fact that the Laborers, the Carpenters and the Sheet Metal Workers performed the disputed work at issue evidences their respective claims to the disputed work.

As noted above, the dispute was *not of Huber's making* as Huber neither assigned the disputed work to the three

competing unions[5] nor had any interest in which of the competing unions should perform the work.[6]

For the foregoing reasons, Arbitrator McKay's decision that the January 18, 2000, grievance constitutes a jurisdictional dispute conforms with case law is and was correct.

E. THE JURISDICTIONAL DISPUTE BETWEEN LOCAL 38 AND HUBER MUST BE RESOLVED PURSUANT TO THE PROJECT STABILIZATION AGREEMENT

It is well established law that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit". *Southern California District Council of Laborers v. Berry Construction*, 984 F.2d 340, 343 (9th Cir. 1993) *citing AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986).

As with any contract, "the parties' intentions control, but those intentions are generously construed as to issues of arbitrability". *Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1139 (9th Cir. 1990).

In determining arbitrability, "[t]he judicial inquiry . . . must be strictly confined to the question whether the reluctant party did agree . . . to give the arbitrator power to make the award he made". *Meiswinkel v. Laborer's*

---

[5] *See International Longshoremen's & Warehousemen's Union, Local 62-B, supra*, at 781 F.2d at 924.

[6] *Id.*

Union Local 261, 744 F.2d 1374 (9th Cir. 1984), *citing United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960).

In *Meiswinkel*, the Laborers filed a grievance under their collective bargaining agreement against Meiswinkel, the employer, alleging that Meiswinkel violated the collective bargaining agreement by assigning disputed cleanup work to the Carpenters, a competing union. *Meiswinkel* at 744 F.2d at 1375.

The Laborers' collective bargaining agreement provided, however, that the grievance and arbitration mechanism is invoked for "[a]ny dispute concerning the interpretation or application of this Agreement, *other than a jurisdictional dispute. . . .* " (Emphasis added). *Id.* at 1375-76. Nevertheless, an arbitration award was issued under the Laborers' collective bargaining agreement upholding the Laborers' claim of entitlement to the disputed work. *Id.* at 1376.

The Ninth Circuit held that the arbitration award was unenforceable because:

> "[i]t is clear from the uncontroverted facts in the record that the dispute was jurisdictional. The Carpenters' and Laborers' Unions both felt that they were entitled to perform the cleanup work. The employer was caught between rival demands." *Id.* at 1377.

The Court stated that "[t]he contractual language forbade the arbitrator to decide this dispute". *Id.* The Court summarized:

> Since '[t]he arbitrator's authority is circumscribed by the arbitration agreement, and he can

> bind the parties only on those issues that they have agreed to submit to him' [citation omitted], the district court did not err in its determination that the award is unenforceable.' *Id.*

In *New England Mechanical, Inc. v. Laborers Local Union 294*, 909 F.2d 1339 (9th Cir. 1990), the Ninth Circuit, relying on *Meiswinkel*, *supra*, held that it was implausible for the Board of Adjustment ("Board") under a Laborers' agreement to determine that the Laborers' collective bargaining agreement provided for resolution of a jurisdictional dispute where the collective bargaining agreement provided that the board could resolve "'[a]ny dispute regarding the interpretation or application of this Agreement, *other than a jurisdictional dispute*.'" (Emphasis added). *New England Mechanical* at 909 F.2d at 1345-46.

By contrast, in the case at hand, on July 21, 1997 the parties executed a Project Stabilization Agreement for the Pacific Bell Ballpark Project. The Project Stabilization Agreement provided as follows:

> This Agreement [is] made and entered into the 21st day of July, 1997 by and between Huber, Hunt & Nichols/Kajima, A Joint Venture of Huber, Hunt & Nichols Inc./Kajima Construction Services, Inc. (hereinafter referred to as Contractor), and Employers Advocate, Inc. (As Labor Relations Coordinator, hereinafter referred to as Coordinator), together with Subcontractors of whatever tier who shall become signatory to this Agreement in accordance with Appendix B (hereinafter referred to as Subcontractors), the San Francisco Building & Construction Trades Council, and the affiliated AFL-CIO Construction Unions signatory to this Agreement (hereinafter

> referred to as "Unions"). *The parties further agree that the provisions of this Agreement shall apply to construction work, under control of, and performed by the Contractor and Subcontractors on the Pacific Bell Ballpark Project.*
>
> (Emphasis added.)

The Unions that were signatory to the PSA included Local 38, the Laborers, the Carpenters and the Sheet Metal Workers.

The parties agreed to be bound to the dispute resolution procedures under the PSA.

Section 1.2 of the Project Stabilization Agreement states that:

> To maintain a spirit of harmony, labor-management relations peace, and stability during the term of this Agreement, the parties agree to establish effective and *binding* methods for the settlement of all misunderstandings, disputes or grievances which may arise by establishing binding grievance and arbitration procedures. (Emphasis added).

As discussed above, the Project Stabilization Agreement was intended by the parties to be controlling over any applicable collective bargaining agreement, including that of Local 38. **Section 2.2** of the Project Stabilization Agreement states that:

> Any provision of Local Collective Bargaining Agreements contrary to or conflicting with this Agreement or contrary to the intent and meaning of this Agreement *shall not be enforced* as to the Contractor or Subcontractor working under the terms of this Agreement. (Emphasis added)

To the extent that Local 38's collective bargaining agreement is contrary to or in conflict with the Project Stabilization Agreement, the collective bargaining agreement must not be enforced.

The Project Stabilization Agreement provides the *exclusive remedy* for Huber and Local 38 in the event of a jurisdictional dispute. **Section 5.2** of the Project Stabilization Agreement states that:

> Where a jurisdictional dispute exists, it shall be first referred for resolution to the Local Unions. If they are unable to resolve the dispute, the dispute shall then be referred for resolution to the International Union General Presidents. The resolution of the dispute shall be reduced to writing, signed by the authorized representative of the International Unions and Contractor or Subcontractors. The assignments made by the Contractor or Subcontractors shall be followed until such time as the dispute is resolved in accordance with this section.

Article 6 to the Project Stabilization Agreement states:

> **6.4** Any dispute, **excluding jurisdictional disputes (Article 5)**, concerning any application or interpretation of a Local Collective Bargaining Agreement shall be subject to the applicable grievance procedure of said Local Collective Bargaining Agreement. (Emphasis added).

But as demonstrated above, it is clear from the uncontroverted facts that the January 18, 2000 grievance filed by Local 38 was a classic, traditional jurisdictional claim of work sought by competing unions.

Because Article 6.4 to the Project Stabilization Agreement *expressly excluded jurisdictional disputes* from arbitration under Local 38's collective bargaining agreement, Huber and Local 38 did not agree to submit jurisdictional disputes to arbitration under Local 38's collective bargaining agreement. In fact, Article 6.4 to the Project Stabilization Agreement *forbids* the Local 38 Arbitration Committee to arbitrate the jurisdictional dispute under Local 38's collective bargaining agreement.

Because the Arbitration Committee's authority is circumscribed by Articles 5.2 and 6.4 of the Project Stabilization Agreement wherein the Local 38 Arbitration Committee can bind Huber and Local 38 only on those issues that they have agreed to submit to it, i.e., "[a]ny dispute, **excluding jurisdictional disputes (Article 5)** concerning any application or interpretation of a Local Collective Bargaining Agreement . . . ", the arbitration award issued in favor of Local 38 by the Arbitration Committee is void and unenforceable.

F. THE GRIEVANCE FILED BY LOCAL 38 DOES NOT CONSTITUTE A PURELY CONTRACTUAL DISPUTE BECAUSE THERE EXISTED COMPETING CLAIMS FOR THE DISPUTED WORK

In *Capitol Drilling*, *supra*, a 3-2 majority of the NLRB held that a jurisdictional dispute will be recognized under Section 10(k) of the NLRA where a competing union not only pursues a contractual claim against an employer for breach of a collective bargaining agreement's exclusive hiring provisions, but makes a coercive claim for the disputed work.

But in a later decision, *Laborers' International Union of North America, Local No. 113 (Super Excavators)*, 327 NLRB 31, 159 LRRM 1281 (1998), the Board limited *Capitol Drilling*. The Operating Engineers, which sought work performed by the Laborers, claimed that the dispute at issue was not a jurisdictional dispute because "it has expressly disclaimed any interest in reassignment of the work in dispute; it merely filed a grievance requesting pay-in-lieu of work". *Id.* at 159 LRRM at 1282.

The NLRB disagreed, finding that the Operating Engineers' claim constituted a competing claim for the disputed work and thus a jurisdictional dispute. The NLRB stated that: (1) the Laborers, a competing union, had at all times claimed the work in dispute; and (2) the Operating Engineers sought reassignment of the disputed work. *Id.*

Similarly, in *Plasterers and Cement Masons, Local 502 (PMB Concrete, Inc.)*, 328 NLRB 84, 161 LRRM 1211 (1999), the NLRB rejected the Cement Masons' assertion that no jurisdictional dispute existed because there were no competing claims for the disputed work and further, the union did not engage in any proscribed, coercive activity. In support of its finding that the underlying dispute *was* a jurisdictional dispute, the NLRB stated that the conduct by the Cement Masons in approaching the subcontractor at issue (the employer) and stating that the work at issue was the Cement Masons', constituted a clear and direct claim to the employer for the disputed work, and was therefore jurisdictional in nature. *Id.* at 161 LRRM at 1213.

In the case at hand, Arbitrator McKay found that there existed competing claims over the disputed work. In support of his finding, Arbitrator McKay concluded that:

> Representatives of the Carpenters, the Sheet Metal Workers and the Laborers appeared at the arbitration and claimed the work assignments were done properly. All of the work in question, according to the three crafts who appeared, belong within their jurisdictional authority.

Arbitrator McKay further found that Local 38 made a *claim* for the disputed work. In support of his finding, Arbitrator McKay found that:

> Mr. Larry Mazzola, executive officer for UA Local 38, *made a demand* on Ray Zunino, the construction manager for the Employer, that certain work which is presently being performed by workers of other craft unions be reassigned to workers who are members of UA Local 38. [Emphasis supplied.]

The two-pronged test set forth in *Super Excavators* has been met in this case and Local 38's grievance constituted a true jurisdictional dispute because: (1) Local 38, the Carpenters, the Laborers and the Sheet Metal Workers had competing claims for the disputed work at issue; and (2) Local 38 not only pursued its contractual remedies against Huber, but also made a claim directly to Huber for the disputed work.

VI.

CONCLUSION

The unanimous decision of the Ninth Circuit panel was correct and should not be disturbed. It is consistent

with the case law of this Court and of the Ninth Circuit itself. For the reasons set forth herein, this Court should deny the petition for writ of certiorari.

Dated: July 2, 2002

Respectfully submitted,

STANTON, KAY & WATSON, LLP

JAMES P. WATSON
Counsel of Record for Respondent